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THE 2000 FEDERAL CIVIL RULES REVISIONS

CARL TOBIAS*

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I. INTRODUCTION

During April 2000, the United States Supreme Court prescribed a comparatively thorough set of amendments to the Federal Rules of Civil Procedure. These amendments took effect in December 2000.¹ That

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I wish to thank Michael Higdon, Peggy Sanner, and Jeff Stempel for valuable suggestions, Angela Dufva for processing this piece, and Jim Rogers for generous, continuing support. Errors that remain are mine.

1. *Amendments to Federal Rules of Civil Procedure*, 192 F.R.D. 340 (2000) [hereinafter *Amendments*]. The F.R.D. reprinting of the revisions is referred to because it

development represented the culmination of a rule revision proceeding commenced in 1996 by the Judicial Conference of the United States Advisory Committee on Civil Rules (Advisory Committee). Because certain provisos that the Supreme Court included in the 2000 amendments are rather controversial and could alter significant features of modern federal civil litigation primarily involving discovery, these revisions deserve assessment.² This Essay undertakes that effort by emphasizing changes in mandatory prediscovery, automatic disclosure, and the scope of discovery.

The first section of this Essay surveys the historical background of the 2000 group of amendments to the Federal Rules of Civil Procedure. The second portion of the Essay selectively evaluates the most contested and important constituents of the package of revisions and analyzes the effects that federal district court implementation of the 2000 amendments alone and together will apparently have. Ascertaining that several modifications are somewhat controversial and that, individually or in combination, they could have relatively significant impacts, the third segment affords suggestions for future action that members of the legislative and judicial branches, lawyers and parties should consider.

II. ORIGINS AND DEVELOPMENT OF THE 2000 AMENDMENTS

The United States Supreme Court has promulgated three major sets of alterations in the Federal Rules of Civil Procedure since 1980.³ The initial group constituted the first attempt to narrow the broad, flexible system of discovery that the original Federal Rules had instituted in 1938; however, the comparatively inconsequential character of the 1980 effort prompted a vociferous dissent by Justice Lewis F. Powell, Jr., who predicted that "Congress' acceptance of these tinkering changes [would]

is the most accessible version.

2. The revisions took effect because Congress did not exercise its power under the Rules Enabling Act to reject or modify the amendments. See 28 U.S.C. § 2074(a) (1994). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (reinterpreting the Rules Enabling Act based on an analysis of its pre-1934 history); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1599–1600 (1994) (describing Congress's 1988 revision of the rulemaking process).

3. Order Amending the Federal Rules of Civil Procedure, 507 U.S. 1091 (1993); Order Amending the Federal Rules of Civil Procedure, 461 U.S. 1097 (1983); Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997 (1980). For the history before 1980, see generally John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 513–20 (2000) (describing rulemakers' attempts to create an effective system of pretrial discovery); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998) (explaining the changing attitudes toward discovery).

delay for years the adoption of genuinely effective reforms.”⁴ Despite Justice Powell’s prognostication, the Supreme Court prescribed a second, rather comprehensive package of amendments during 1983. This set of revisions (1) mandated that discovery be proportionate to the needs of a particular case; (2) enhanced district judges’ control over the pretrial litigation process as a general matter and over discovery specifically; and (3) increased judicial authority to impose sanctions on litigants and attorneys for contravening requirements that covered prefilings investigations in Federal Rule 11, pretrial conferences in Federal Rule 16, and discovery in Federal Rule 26.⁵

The 1983 amendment of Rule 11 became the most controversial revision in the half-century history of the Federal Rules of Civil Procedure. That situation prompted the Federal Rule revision entities to modify the provision a decade later as one important component of a group of amendments, including a revision imposing compulsory automatic disclosure. That amendment was itself the most disputed proposal ever to alter the Federal Rules.⁶ Virtually all segments of the organized bar adamantly opposed the recommendations that related to automatic disclosure. Practicing attorneys criticized the approach suggested because they contended that the concept would require another unnecessary layer of discovery, erode the traditional adversary process, and create a

4. Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting). See Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 998–1000 (1983). See generally Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 753–60 (1998) (discussing the history and compromises leading to the 1980 Amendments); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 456–59 (1991) (describing the 1980 Amendments and the reaction to them).

5. See Order Amending the Federal Rules of Civil Procedure, 461 U.S. 1097 (1983). See generally ARTHUR R. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984) (analyzing the 1983 Amendments); Subrin, *supra* note 3, at 744–45 (noting that since 1983, the amount of discovery must be proportional to the needs of a particular case).

6. See FED. R. CIV. P. 26(a) (1994) (prior to 2000 amendment); see also Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 17–18 (1992) (noting the existence of local automatic disclosure rules in three district courts prior to the 1993 amendment of Rule 26(a)(1)); Marcus, *supra* note 4, at 764–68 (describing the background of and reaction to the 1993 Amendments); Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 233–36 (1999) (discussing the opposition to the automatic disclosure rules in the 1993 Amendments); Tobias, *supra* note 2, at 1611–13 (describing the process of amending Rule 26).

number of ethical dilemmas, especially implicating counsel and clients. The approach would also leave unclear precisely what information parties must disclose, thus promoting unwarranted and costly satellite litigation over the concept's terminology.⁷ The 1993 changes concomitantly empowered all ninety-four federal district courts to "opt out" of the mandatory automatic disclosure strictures and authorized parties to alter by stipulation this provision as well as several additional discovery requirements, such as those that imposed presumptive numerical limitations on discovery techniques (including interrogatories).⁸

During 1996, the Judicial Conference Advisory Committee—which has principal responsibility for analyzing the Federal Rules of Civil Procedure and developing constructive recommendations for improvement—appointed a Discovery Subcommittee to consider the prospect of further amending the provisions that govern discovery.⁹ The Advisory Committee created this entity despite several facts. First, the Supreme Court had adopted several significant packages of discovery modifications during the preceding decade-and-a-half, one set a mere three years before.¹⁰ Second, most Federal Rules alterations need a generation of implementation and assessment to formulate reliable conclusions about their relative efficacy.¹¹ Third, an increasing number of federal court observers have

7. See, e.g., Order Amending the Federal Rules of Civil Procedure, 507 U.S. 1091, 1099 (1993) (Scalia, J., dissenting); Bell et al., *supra* note 6, at 28–32. Recent discussions of the opposition to the 1993 automatic discovery rule include Thornburg, *supra* note 6, at 233–35; Eric L. Horne, *Changes in Discovery Procedures Under the Federal Rules*, PA. L. WEEKLY, July 3, 2000, at 13, 20.

8. See FED. R. CIV. P. 26(a)(1), 29 (1994) (prior to 2000 amendment); *infra* note 24 and accompanying text. See generally Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996) (deploring the variety of local rules in federal courts); Marcus, *supra* note 4, at 766–68 (noting the Advisory Committee's decision to permit local courts to opt out of the new automatic disclosure rule); Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory For Optional Rules*, 14 REV. LITIG. 49 (1994) (discussing the authorized abrogation of Rule 26 by local district courts); Tobias, *supra* note 2, at 1612–15 (describing the process leading to adoption of the opt out provisions and the responses of local district courts).

9. See Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure, reprinted in 181 F.R.D. 24, 25 (1998) [hereinafter Stotler, Memorandum]; Paul V. Niemeyer, *Here We Go Again: Are The Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 521 (1998) [hereinafter Niemeyer, *Here We Go Again*].

10. See *supra* notes 3–8 and accompanying text.

11. Reporters for the Advisory Committee so asserted. See Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52–53 (1967) (citing Professor Benjamin Kaplan's view); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 677 (1979) (same).

urged the revisors to amend the Federal Rules less often.¹²

The Discovery Subcommittee probed the need for change in the discovery provisos primarily with studies of discovery. It authorized evaluations by the Federal Judicial Center (FJC), the major research arm of the federal courts, and by the RAND Corporation Institute for Civil Justice (RAND), which had recently completed a thorough analysis of expense and delay reduction measures applied in the federal district courts under the Civil Justice Reform Act (CJRA) of 1990.¹³ After examination of the results of these assessments and some additional applicable material, the Discovery Subcommittee suggested that the Advisory Committee propose numerous modifications to the discovery provisions.¹⁴ In early 1998, the Advisory Committee developed a group of proposed revisions of the discovery rules and tendered these recommendations to the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee), which is responsible for considering the suggested improvements in the Federal Rules that the Judicial Conference advisory committees assemble.¹⁵ During the summer of 1998, the Standing Committee published the proposed amendments and sought public comment.¹⁶ The following June, the Standing Committee

12. See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 854–55 (1993). See generally John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435, 436 (1994) (arguing that “[t]oo many revisions representing the personal views of those with power over the rulemaking process are being promulgated too frequently”); Thornburg, *supra* note 6, at 230–33 (arguing that the proposed 1998 revisions of the rules are not neutral or efficient and should be rejected).

13. See Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Anthony H. Scirica, Chair, Committee on Rules of Practice and Procedure, reprinted in 192 F.R.D. 354, 357–58 (2000) [hereinafter Scirica, Memorandum]; James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998); see also Beckerman, *supra* note 3, at 506–09 (describing the results of the RAND and FJC reports); Thornburg, *supra* note 6, at 246–49 (same).

14. See Stotler, Memorandum, *supra* note 9, at 24; Marcus, *supra* note 4, at 768–84.

15. See Stotler, Memorandum, *supra* note 9, at 24; Terry Carter, *The Latest Discovery Mission: Judges Set to Debate Changes that Would Make New Federal Rules Mandatory*, A.B.A. J., Sept. 1999, at 20. On a nine-to-four vote, the Advisory Committee refused to omit the proviso that would narrow discovery's scope. See Scirica, Memorandum, *supra* note 13, at 359–60; Beckerman, *supra* note 3, at 542 n.154.

16. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Proposed Amendments to the Federal Rules of Civil Procedure and*

evaluated the public input, made a small number of comparatively insignificant changes, and then forwarded the package of revisions to the Judicial Conference of the United States.¹⁷ In September 1999, the Judicial Conference concurred with all of the amendments recommended by the Standing Committee, except for a proviso that imposed “cost-bearing,”¹⁸ and submitted the revisions suggested to the Supreme Court.¹⁹ Once the Justices had assessed the set of amendments, the Court transmitted the group of revisions unaltered to Congress in April 2000.

III. ANALYSIS OF THE 2000 AMENDMENTS

The following part of this Essay begins with a descriptive and critical evaluation of the Supreme Court’s 2000 amendments to the discovery strictures. The Essay then considers the effects that the provisions could have individually and together. This section emphasizes those revisions which promise to implement the most substantial changes in the present discovery regime or which have generated the greatest controversy, even though others might be equally important or controversial once federal judges have applied and construed the new provisos and attorneys and parties have attempted to satisfy them.

A. *Specific Amendments*

1. *Automatic Disclosure*

The 2000 amendment to Federal Rule 26(a)(1) significantly alters the 1993 revision that required a party to divulge material that is “relevant to disputed facts alleged with particularity in the pleadings.”²⁰ The new

Evidence, 181 F.R.D. 18 (1998) [hereinafter *Proposed Amendments*]. See generally Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433 (1999) (describing the proposed revisions).

17. On a ten-to-two vote, the Standing Committee refused to omit the proviso that would narrow discovery’s scope. Letter from Richard H. Middleton, Jr., President, Association of Trial Lawyers of America, to William H. Rehnquist, Chief Justice of the United States 6 (Apr. 12, 2000) (on file with author); see also *infra* notes 36–46 and accompanying text (discussing the narrowed scope of discovery contained in the Amendment to Rule 26(b)(1)).

18. Cost bearing would have empowered district judges to permit discovery that was disproportionate to the needs of a case only if the litigant who sought greater discovery paid for it. Proposed Amendments, *supra* note 16, at 87–89 (discussing proposed amendment to Rule 34(b)); see Thornburg, *supra* note 6, at 240; Tobias, *supra* note 16, at 1441.

19. The Standing Committee, on a thirteen-to-twelve vote, also refused to omit the provision that would narrow discovery’s scope. See Letter from Professor Thomas D. Rowe, Duke Law School, to Carl Tobias, Professor of Law, William S. Boyd School of Law (Nov. 19, 1999) (on file with author).

20. FED. R. CIV. P. 26(a)(1) (1994) (prior to 2000 amendment); *Amendments*,

provision commands only that a litigant disclose information that "support[s] its claims or defenses, unless solely for impeachment."²¹ The 2000 amendment thus narrows the 1993 version because the modified version mandates automatic exchange of less material.²² The 2000 revision also applies nationally in each of the federal district courts.²³ This situation substantially differs from the one that existed under the 1993 proviso, which authorized all districts to "opt out" by adopting local variations on the federal requirements or by eschewing those commands; numerous courts relied on that provision to reject the strictures in the federal amendment.²⁴

The rule revisors, in particular the Judicial Conference Civil Rules Advisory Committee, apparently based the alteration implicating automatic disclosure mainly on two important perceptions. The first was the controversial nature of the disclosure requirements that the 1993 amendment had imposed.²⁵ The second was a notion that the opt-out measure had additionally fractured the already fragmented condition of federal civil practice because the mechanism encouraged the district courts to institute local disclosure procedures that diverged from the federal disclosure strictures or to reject them altogether.²⁶

supra note 1, at 382; see also Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 489-90 (1995) (describing the disclosure required by the 1993 Amendment of Rule 26); Charles W. Sorensen, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)*— "Much Ado About Nothing?," 46 HASTINGS L.J. 679, 721-24 (1995) (same); Thornburg, *supra* note 6, at 236-37 (same).

21. *Amendments*, *supra* note 1, at 382.

22. The new stricture will invariably limit incentives to plead with particularity and thus honor the notice pleading system in the Federal Rules. See Beckerman, *supra* note 3, at 534-43; Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986). However, the change that narrows discovery's scope could enhance the incentives to plead with specificity. See *infra* notes 40-41 and accompanying text.

23. See *Amendments*, *supra* note 1, at 384-85 (advisory committee's note); see also *Amendments*, *supra* note 1, at 391 (advisory committee's note) (stating that the 2000 revisions omit local option provisions for limitations on depositions and interrogatories).

24. FED. R. CIV. P. 26(a)(1) (1994) (prior to 2000 amendment); see also DONNA STIENSTRA, FEDERAL JUDICIAL CENTER, IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (Mar. 30, 1998), reprinted in 182 F.R.D. 304 (1998) (describing variation in district courts' local rules regarding automatic disclosure); *supra* note 8 and accompanying text.

25. See *supra* notes 6-7 and accompanying text.

26. See Niemeyer, *Here We Go Again*, *supra* note 9, at 519; Willging et al., *supra* note 13, at 541; Horne, *supra* note 7, at 13; *supra* notes 8, 24 and accompanying text.

These perceptions may have been incorrect, however. First, the 1993 disclosure revision has seemingly been less controversial than certain observers had predicted. For example, the FJC evaluation determined that many more attorneys “reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them.”²⁷ The FJC assessment also observed that “many more attorneys said initial disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement than said it decreased them.”²⁸ Second, the opt-out technique might have balkanized federal civil procedure considerably less than numerous critics had asserted. For instance, only sixteen percent of lawyers whom the FJC surveyed thought that the application of conflicting automatic disclosure provisions and discovery devices across federal districts created serious difficulties, and a mere six percent believed that intradistrict inconsistency produced such problems.²⁹

It is unclear why the Advisory Committee chose to suggest the modifications in automatic disclosure at this juncture. The FJC and RAND studies indicate that the 1993 amendment instituting disclosure has operated rather effectively. Insofar as the revision has appeared to function less well, this perception could have resulted from the comparatively limited implementation and analysis that the amendment has received or from the controversy that attended the initial consideration and prescription of the 1993 disclosure concept.

Even if the current need for change were substantially greater, the 2000 revision might not represent a very significant improvement. The amendment replaces terminology that has comparatively definite meaning, and to which judges, attorneys, and parties are accustomed, with phraseology that might prove to be rather unclear. The new language could correspondingly foster ancillary litigation over its construction and the scope of disclosure mandated, thereby imposing unnecessary cost and delay.³⁰ Moreover, the requirement that litigants

27. Willging et al., *supra* note 13, at 535.

28. *Id.* The FJC found minimal evidence that disclosure requirements led to satellite litigation. *Id.* The RAND study concurred with this finding but determined that disclosure or lack thereof had little impact on expense or delay. See Kakalik et al., *supra* note 13, at 658, 678.

29. See Willging et al., *supra* note 13, at 583 tbl.34. The FJC did assert that growing numbers of judges and attorneys have claimed that inconsistency in the disclosure and discovery rules presents serious problems that deserve resolution. *Id.* at 541–42, 583–84. Sixty percent of counsel surveyed believe that interdistrict conflicts pose difficulty. *Id.* at 583. “Altogether, just over half the districts have implemented 26(a)(1).” STIENSTRA, *supra* note 24, at 309.

30. See Horne, *supra* note 7, at 20; Pearl Zuchlewski, *Proposed Amendments May Transform Federal Civil Discovery Rules*, N.Y. L.J., Aug. 10, 1999, at 1. See generally

release less information might complicate plaintiffs' attempts to secure the material those parties need for proving and settling the litigation they pursue.³¹ Furthermore, the 2000 revision modifies the disclosure strictures that apply in all cases, even though the FJC and RAND assessments determined that the 1993 amendment caused difficulties in rather few lawsuits, particularly complex litigation.³²

In the end, the rule revisors, most significantly the members of the Advisory Committee, seemed ambivalent about the disclosure notion.³³ The Advisory Committee apparently conceded that judges and lawyers have not subscribed wholeheartedly to the 1993 revision and that the disclosure provision has minimally affected discovery, but at the same time, the Committee evidenced unwillingness to jettison the idea and attempted to preserve some vestige of it.³⁴ The Advisory Committee's perspective, thus, may partly reflect the ambivalence expressed by many judges and counsel.³⁵

2. Scope of Discovery

The 2000 amendment also narrows the scope of discovery that the Federal Rules of Civil Procedure have traditionally allowed parties. For decades, litigants have been able to secure material that is "relevant to

Beckerman, *supra* note 3, at 540–41.

31. See Thornburg, *supra* note 6, at 249–54; Horne, *supra* note 7, at 20; Zuchlewski, *supra* note 30, at 6. The new disclosure rules also apply nationwide, sacrificing the district courts' flexibility to match the device with local circumstances and ability to engage in experimentation that might identify a superior disclosure procedure. See *infra* notes 71–72 and accompanying text; see also Tobias, *supra* note 2, at 1615–16 (suggesting that local variation may help identify the most effective disclosure mechanism); Carter, *supra* note 15, at 20 (noting that allowing local variation in disclosure rules "created laboratories for litigation reform").

32. See Beckerman, *supra* note 3, at 506–09; Kakalik et al., *supra* note 13, at 682; Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 685–86 (1998); Thornburg, *supra* note 6, at 246–49; Willging et al., *supra* note 13, at 551.

33. See Edward D. Cavanagh, *Obstacles in the Search for Truth: Proposed Amendments to the Federal Rules of Civil Procedure Hinder Discovery in Ways Unnecessary and Unjust*, LEGAL TIMES, July 27, 1998, at 21.

34. See *id.* Indeed, the chair of the Advisory Committee candidly admitted that: The beginning was a strong disclosure rule that could be, and was, defeated by local option. The next step is a diluted disclosure rule that cannot be defeated by local option. Perhaps in several more years the time will come for a strong disclosure rule that cannot be defeated by local option.

Stotler, Memorandum, *supra* note 9, at 30.

35. See Willging et al., *supra* note 13, at 543, 592; Carter, *supra* note 15, at 20.

the subject matter involved in the pending action.”³⁶ The new version limits the scope of discovery to information that is “relevant to the claim or defense,” and parties can only acquire material that is “relevant to the subject matter” by filing motions showing good cause why they should have broader discovery.³⁷ The rule revisors’ apparent purposes in devising the change are to restrict discovery and fishing expeditions by limiting parties to discovery that involves matters which they raise in the pleadings.³⁸

Several important aspects of the alteration in discovery’s scope resemble significant features of the 2000 amendment of the mandatory automatic disclosure rule. First, it is not clear why the rule revision entities adopted this modification at the current time.

For instance, the FJC and RAND evaluations suggest that discovery operates effectively in most lawsuits and that the 1993 amendments have functioned rather well.³⁹ Insofar as overly broad discovery creates complications, judges have numerous ways of restricting its breadth.

Were change in discovery more clearly needed at this juncture, the revision prescribed might not foster marked improvement. For example, the modification might fail to narrow discovery. The amendment substitutes a new standard, which will probably promote satellite litigation over interpretation of the scope of discovery; the longstanding “subject matter” standard has relatively certain meaning and is one with which judges, attorneys, and litigants are familiar. The revision might concomitantly erode the conventional notice pleading regime that the original Advisory Committee instituted in the initial Federal Rules during 1938 and that federal judges have carefully cultivated over the course of the ensuing six decades.⁴⁰ For instance, the “claim or

36. Information can be discovered if it “appears reasonably calculated to lead to the discovery of admissible evidence,” even if the material is inadmissible at trial. FED. R. CIV. P. 26(b)(1). See generally Beckerman, *supra* note 3, at 513–17 (describing the goals of broad discovery rules); Marcus, *supra* note 4, at 748–49 (discussing the broadening of discovery between 1938 and 1970); Subrin, *supra* note 3, at 734–45 (analyzing early judicial reactions to discovery reform).

37. *Amendments*, *supra* note 1, at 388. See generally Gregory P. Joseph, *Civil Rules II*, NAT’L L. J., Apr. 24, 2000, at A17 (discussing the 1998 proposed changes to the scope of discovery); Thornburg, *supra* note 6, at 237–39 (same).

38. See Stotler, Memorandum, *supra* note 9, at 27, 32–33; Cavanagh, *supra* note 33, at 21.

39. See Kakalik et al., *supra* note 13, at 682; Willging et al., *supra* note 13, at 534–35. The 1993 revisions apparently restricted the contentiousness that attends discovery, while enabling litigants to secure needed discovery. Tobias, *supra* note 16, at 1440. *But cf.* Beckerman, *supra* note 3, at 506–09 (noting that “discovery disputes occur in substantially greater numbers than in years past”).

40. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); see also Carl W. Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 357 (1994) (analyzing the effect of the *Leatherman* case on pleading requirements); Letter from Richard H. Middleton, *supra* note 17, at 2 (arguing that changing the scope of discovery would abolish notice

defense" language may require that plaintiffs draft comparatively specific, fact-based pleadings before they can gain access to material under defendants' control that was previously available under general notice pleading.⁴¹ Thus, to secure the discovery formerly available, the new definition of the scope of discovery might prompt plaintiffs to draft broader pleadings than the information they have can support, thereby making themselves more vulnerable to motions to dismiss under Rule 12(b) and motions for sanctions under Rule 11.⁴²

Circumscribing discovery could also frustrate the efforts of plaintiffs to prove and settle their lawsuits. The provision for judges to grant increased discovery on parties' motions for good cause shown might ameliorate this situation. Nevertheless, certain practical realities of modern federal civil litigation could make the provision deficient. Those phenomena include the costs that plaintiffs must incur when they request enhanced discovery, the pressures that increasing lawsuits and the growing need for judicial case management impose on the district courts, the reluctance on the part of many in the federal judiciary to spend limited resources on discovery controversies, and numerous judges' distaste for resolving discovery disputes.⁴³ These circumstances, in combination with the diminished information that litigants must divulge through automatic disclosure,⁴⁴ may detrimentally affect the relative equilibrium which has heretofore prevailed between the interests of plaintiffs and defendants.⁴⁵

pleading). See generally Beckerman, *supra* note 3, at 534–43 (discussing discovery's functions in a notice pleading system); Marcus, *supra* note 22 (discussing the notice pleading system).

41. See Joseph, *supra* note 37, at A17; Zuchlewski, *supra* note 30, at 6. These impacts deserve comparison with the effects that the disclosure amendment could have. See *supra* note 22 and accompanying text.

42. See generally Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988–89).

43. For a discussion of judicial reluctance to manage discovery, see Beckerman, *supra* note 3, at 565–69. For a suggestion that the amendment was intended to force the judiciary to play a bigger role in managing discovery, see Thornburg, *supra* note 6, at 251–52. See also Joseph, *supra* note 37, at A17 ("Judges who are not eager to hear more discovery disputes are not likely to be excited by the prospect of more motion practice devoted to the pleadings, but the drafters determined otherwise.").

44. See *supra* notes 21–22, 31 and accompanying text.

45. See Beckerman, *supra* note 3, at 540–41; Cavanagh, *supra* note 33, at 25; Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* 64 LAW & CONTEMP. PROBS. 198 (2001); Thornburg, *supra* note 6, at 262 ("The proposed amendments go part of the way toward giving the business lobby what it asked for"); Zuchlewski, *supra* note 30, at 6; Letter from Richard H. Middleton, *supra* note 17, at 2–3. But see Scirica, Memorandum, *supra* note 13, at 356–58; Stotler, Memorandum,

Finally, the new proviso would govern all lawsuits, even though the FJC and RAND assessments indicate that overly broad discovery only poses problems in a few comparatively complicated cases.⁴⁶

3. *Presumptive Limitations on Depositions*

Analogous notions apply to the change that imposes presumptive limitations on oral depositions of one day of seven hours.⁴⁷ For example, it remains unclear precisely why the amendment is necessary at this particular time. When the length of depositions creates difficulties, judges can invoke Federal Rule 30 or match temporal restrictions with a specific lawsuit's requirements in pretrial conferences.⁴⁸ The modification also governs every case, but limitations might be needed only in a small number of suits.⁴⁹

B. General Ideas

The evaluation above shows that the components of the 2000 amendments that are most controversial and that significantly alter the Federal Rules have several commonalities. First, the present necessity for change, especially in light of the FJC and RAND determinations that automatic disclosure and discovery have worked relatively well since 1993, is not clear. Second, insofar as disclosure or discovery fosters problems that require treatment, the complications appear to occur in comparatively few actions, and judges have many means of addressing the difficulties presented. These facts indicate that the rule revisors' decision to have the new strictures apply in all cases may be unwarranted. Third, even if there actually were a greater need for modification, the amendments might not ultimately constitute improvements. For instance, the alterations could tip toward defense interests, thereby altering the longstanding, carefully calibrated balance obtained between plaintiffs and defendants.⁵⁰ Parties will be entitled to less material or will have to absorb increased costs when pursuing information to which they formerly had access, and these changes may well have more adverse effects on plaintiffs. The

supra note 9, at 27 (“[W]e have not proposed reducing the breadth of discovery, nor have we intended to undermine the policy of full and fair disclosure in litigation.”); Carter, *supra* note 15, at 20 (quoting Judge Paul Niemeyer, chair of the Advisory Committee, who asserts that the new rules are “the best shot we have for the overall system rising above any particular interest”).

46. See *supra* note 39 and accompanying text.

47. See *Amendments*, *supra* note 1, at 393 (amendment of Rule 30(d)(2)).

48. See Cavanagh, *supra* note 33, at 25.

49. Tobias, *supra* note 16, at 1440 n.42.

50. See *supra* notes 31, 41, 45 and accompanying text.

disclosure and discovery revisions will also replace provisos that have rather definite meaning, and to which judges, parties, and lawyers are accustomed, with new language that might prove ambiguous, necessitate a decade of implementation and construction, and promote expensive ancillary litigation. If the amendments in fact operate as the rule revision entities intended, however, the modifications may have salutary impacts. For example, the alterations might improve discovery by conserving the substantial resources that courts, clients, and attorneys currently expend and by limiting discovery abuse.⁵¹

A number of the propositions discussed, therefore, suggest that the disadvantages that particular components of the 2000 Federal Rules amendments will apparently impose alone and in combination may be larger than the benefits. Nonetheless, these ideas are comparatively controversial and relatively unclear, and the expert rule revisors developed the new provisos after commissioning analyses and conducting considerable study as well as seeking and evaluating public input. The fourth part of this Essay, accordingly, provides recommendations for the litigants and counsel who must comprehend and satisfy the new rules, judges who will interpret and apply them, and Congress and the federal judiciary which should monitor them.

IV. SUGGESTIONS FOR THE FUTURE

A. Parties and Counsel

The earlier analysis indicates that the Federal Rule revision entities intended the 2000 amendments individually and together to narrow discovery, but at the same time, the changes could complicate the efforts of parties, especially plaintiffs, to secure needed information that was previously available.⁵² Litigants will still be able to obtain this material, however, albeit with greater difficulty and expense. For instance, the alteration of automatic disclosure requires parties to divulge less information at the outset of the litigation. However, virtually all of the material that the 1993 revision mandated be disclosed, and that the 2000 amendment may not, can ultimately be acquired through subsequent formal

51. This assumes that the idea of discovery abuse, over which there has been perennial, controversial debate, can be satisfactorily defined, delineated, and treated. See, e.g., Mullenix, *supra* note 32, at 684; Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649 (1989).

52. See *supra* notes 20–49 and accompanying text.

discovery. The narrowing of the information which must be exchanged without demand might prove responsive to concerns expressed about the 1993 revision that instituted disclosure. These concerns include confusion over exactly what material the parties are to divulge, the potential for one litigant to make the opposing side's case, and certain ethical dilemmas that the 1993 amendment purportedly created.⁵³

Analogous ideas apply to the 2000 revision that limits the scope of discovery. For example, insofar as parties already possess, or have access to, material that enables them to plead with particularity, the litigants can generally secure information similar to that which they could acquire before the 2000 amendment. Some parties that do not have, or lack access to, such information may be able to conduct prefilings investigations that permit them to plead with sufficient specificity. Litigants that cannot so plead can still secure the material with motions that make good cause showings why the parties are entitled to that information.⁵⁴ Judicial reluctance to resolve discovery disputes,⁵⁵ as well as the tactical and economic incentives that accrue from opposing discovery motions, could frustrate attempts to obtain more material. This unwillingness on the part of many judges, the dislike of some for discovery controversies, and the threat that others will strictly or rigidly enforce discovery commands may encourage litigants to compromise their differences without invoking the judicial machinery, a practice which the Advisory Committee expressly condones.⁵⁶

The rule revisors' reinstitution of nationally applicable requirements in most discovery rules will apparently yield more benefits than disadvantages. The deletion of practically all of the local option provisos should assist parties and attorneys who litigate in multiple districts by diminishing the need to find, understand, and satisfy disparate local discovery mandates. The principal beneficiaries of the new uniformity will be institutional entities, including large law firms and defendants (namely corporations), as well as the United States Department of Justice (which is involved in 40 percent of federal court cases), and national public interest groups, such as environmental and civil rights advocates. However, parties and counsel should remember that a few local option provisions will remain in

53. See *supra* note 7 and accompanying text.

54. "The good-cause standard warranting broader discovery is meant to be flexible." *Amendments, supra* note 1, at 389 (advisory committee's note).

55. See *supra* note 43 and accompanying text.

56. "In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention." *Amendments, supra* note 1, at 389 (advisory committee's note). Similar dynamics may apply to the presumptive limitations that the rule revisors imposed on depositions. See *supra* notes 47–49 and accompanying text.

effect.⁵⁷ Moreover, inconsistent strictures govern local discovery practice in the ninety-four federal district courts, ranging over a broad spectrum from formal local rules to unwritten individual-judge practices.⁵⁸

B. Judges

Judges must be aware of, and attempt to remedy or ameliorate, the possible difficulties that were delineated earlier in this Essay. Perhaps most important is the potential to alter the rather delicate balance that previously existed between the interests of plaintiffs and defendants.⁵⁹ The original Federal Rules instituted, and many subsequent amendments preserved, a system of general notice pleading and flexible, liberal discovery; the rule revision entities intended amendments of the Federal Rules to maintain that scheme and the plaintiff-defendant equilibrium, and to foster resolution of disputes on the merits.⁶⁰ Rules revisions since 1938, including the 1983, 1993, and 2000 amendments, which did limit discovery somewhat, were not meant to modify this regime substantially.⁶¹

These ideas mean that judges must be alert to, and institute, efforts that will rectify or reduce certain problems that the 2000 revisions may create. More specifically, when plaintiffs lack, or cannot secure access to, material that they need for pleading with the requisite particularity to satisfy the 2000 amendment to the scope of discovery, judges should find this sufficient to meet the good cause showing. Members of the judiciary, therefore, should flexibly and pragmatically apply the new stricture on discovery's scope,⁶² remembering that several major policies underlie the Federal Rules generally and notice pleading and broad

57. See, e.g., *Amendments*, *supra* note 1, at 392–93 (FED. R. CIV. P. 26(f) advisory committee's note); see also *Amendments*, *supra* note 1, at 391 (FED. R. CIV. P. 26(b)(2) advisory committee's note) (stating that Rule 36 authorizes local rules imposing limitations on requests for admissions).

58. For analyses of the extent and consequences of local rule variation, see Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1398–99 (1992); Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. (forthcoming Dec. 2001).

59. See *supra* notes 31, 41, 45, 50 and accompanying text.

60. See, e.g., Marcus, *supra* note 22, at 433–34; Subrin, *supra* note 3, at 710–34; Tobias, *supra* note 2, at 1591–92.

61. See, e.g., Scirica, Memorandum, *supra* note 13, at 356–58; Marcus, *supra* note 4, at 760–68; Subrin, *supra* note 3, at 734–45.

62. See *supra* note 54 and accompanying text.

discovery specifically. Those policies include permitting plaintiffs' cases to proceed even though the parties cannot plead with particularity, affording the litigants access to information that might allow the parties to prove their contentions or facilitate settlement, and avoiding technicalities which prevent merits-based disposition of lawsuits.⁶³ In short, judges must keep in mind the potential "catch-22" that the change in discovery's scope could impose. The new provision permits discovery of material that is "relevant to the claim or defense;" however, plaintiffs may not have the very information that would enable them to draft pleadings specific enough to make needed material "relevant" to their claims.⁶⁴ By way of contrast, when plaintiffs engage in fishing expeditions, judges could honor the rule revisors' intent with limitations on this type of activity.⁶⁵

Members of the bench should also be aware of and address strategic efforts to capitalize on informational and resource disparities between litigants. For example, plaintiffs who pursue employment and civil rights litigation alleging discrimination frequently have little information, few financial resources, and limited political power, especially in comparison with defendants, which are often corporate or governmental entities.⁶⁶ Judges must be sensitive to the possibility that some defendants will rely on these discrepancies to disadvantage plaintiffs. For instance, defendants can deny plaintiffs access to material, require them to file motions and seek court orders, demand the litigants' participation in hearings and conferences, and deplete plaintiffs' scarce resources.⁶⁷ When members of the judiciary detect this type of activity, they should expeditiously and firmly respond to it. For example, judges might

63. See *supra* notes 54, 60–61 and accompanying text. Similar ideas apply to the narrowing of disclosure and the deposition limitations effected by the 2000 revisions. Judges should be alert to the possibility that the alterations will complicate plaintiffs' efforts to obtain information needed to prove or settle suits and, if that prospect materializes, be prepared to institute appropriate measures. See *supra* notes 20–35, 47–49 and accompanying text.

64. The Advisory Committee stated:

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.

Amendments, *supra* note 1, at 389 (FED. R. CIV. P.26(b)(1) advisory committee's note). This "catch-22" resembles the analogous phenomenon created by the 1983 amendment to Rule 11, which the rule revisors substantially amended again in 1993. See Tobias, *supra* note 42, at 493–95; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200–01 (1988).

65. See *supra* note 38 and accompanying text.

66. See, e.g., Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 296–99 (1992); Tobias, *supra* note 42, at 495–98.

67. See, e.g., Baumann et al., *supra* note 66, at 225–95; Tobias, *supra* note 58, at 1422–25.

accord plaintiffs increased access to information that defendants possess, flexibly grant plaintiffs more time for taking depositions than amended Rule 30 prescribes, reject defense motions, limit defendants' requests for meetings, or even impose sanctions on defendants if warranted. Certain plaintiffs may similarly attempt to extract tactical benefits by, for instance, seeking overly expansive discovery. Members of the bench must be alert to this possibility and treat the parties' conduct as judges would address analogous behavior of defendants.

Members of the judiciary should institute actions that conserve and protect the courts' scarce resources. For example, judges could encourage litigants and counsel to meet and confer in an effort to resolve discovery disputes without judicial intervention while stringently enforcing the Rules that require party consultation.⁶⁸ Members of the bench might also employ incentives that facilitate that activity or rely on measures, such as sanctions to discourage inappropriate conduct, namely the failure to cooperate.

C. Congress and the Federal Judiciary

Congress and the federal judiciary should closely monitor the implementation and application of the 2000 federal rules amendments. For instance, lawmakers or the courts could commission studies of the revisions' operation by an expert, independent entity, such as RAND or the FJC. Evaluators must rigorously analyze the recent changes by collecting, examining, and synthesizing the maximum relevant empirical data.

As a general matter, assessors should undertake studies that resemble those conducted by RAND and the FJC.⁶⁹ For example, evaluators might consider how frequently the 2000 amendments pose particular kinds of difficulties, for which parties and attorneys, and in what types of cases. Assessors could specifically emphasize the possible problems that derive from the narrowing of disclosure and the scope of discovery identified above. These complications include the potential to upset the balance between plaintiffs and defendants by limiting plaintiffs' access to information, thereby restricting their capacity to plead, prove, and settle cases. Evaluators should also scrutinize the 2000 revisions' effects on the costs of litigation and time to disposition. Other important questions will be

68. See FED. R. CIV. P. 26(f), 37(a)(2); *supra* note 55 and accompanying text.

69. See *supra* note 13 and accompanying text.

whether the amendments generate unwarranted, expensive satellite litigation, particularly over the modifications' phraseology, and if so, how much and at what cost. Assessors might concomitantly examine the ways in which judges interpret and enforce the changes; how parties and lawyers discover, employ, and satisfy them; and implementation's salutary and detrimental impacts for the judiciary, litigants, and counsel.

Finally, evaluators should analyze the effects of eliminating many local option provisions related to discovery. This Essay's earlier assessment suggested that the reinstitution of nationally applicable strictures affords certain benefits. For instance, it would save resources that parties and attorneys must devote to finding, understanding, and satisfying diverse discovery mandates.⁷⁰ However, the abrogation of local option provisions can limit the courts' flexibility to test promising discovery procedures and develop commands tailored to peculiar local complications.⁷¹ If careful scrutiny supports these assertions, Congress and the judiciary may want to consider adopting a 1991 proposed amendment to Federal Rule 83 that would have authorized the federal districts to experiment with efficacious measures for five years.⁷²

V. CONCLUSION

The Supreme Court recently promulgated a significant package of discovery amendments that became effective during December 2000. Litigants and lawyers should master and comply with the new strictures, individual district judges must sensitively apply and construe them, and members of Congress and the judiciary should closely monitor the requirements' nascent implementation.

70. See *supra* note 57 and accompanying text.

71. See A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 888-94 (1993). See generally Robert E. Keeton, *The Function of Local Rules and the Tension With Uniformity*, 50 U. PITT. L. REV. 853 (1989).

72. The proposed revision of Rule 83(b) is contained in Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., *Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 153 (1991). The Rule revisors withdrew the proposal out of apparent deference to contemporaneous experimentation under the Civil Justice Reform Act of 1990. See A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1582-83 (1991).